



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 16, 2014

OAG—09—14

Mr. Brad D. Schimel
District Attorney
Waukesha County Courthouse
515 West Moreland Boulevard, Room CG-72
Waukesha, WI 53188

Dear Mr. Schimel:

¶ 1. You have requested an opinion on whether an alderman in the City of Oconomowoc who owns a partial interest in properties in the city would violate Wis. Stat. § 946.13(1)(a) even if he abstains from voting on zoning decisions relating to the properties. Specifically, the alderman owns a partial interest in two properties with a zoning application pending with the city, one for a zoning variance and one for a conditional use permit.

¶ 2. I conclude that the alderman would not be in violation of Wis. Stat. § 946.13(1)(a) because the statute does not apply to a public official's involvement in a municipality's exercise of its zoning powers, which includes granting zoning variances and conditional use permits. *See Town of Rhine v. Bizzell*, 2008 WI 76, ¶¶ 55-57, 311 Wis. 2d 1, 751 N.W.2d 780, (conditional use permits); *State v. Waushara Cnty. Bd. of Adjustment*, 2004 WI 56, ¶ 33, 271 Wis. 2d 547, 679 N.W.2d 514 (zoning variances). By its terms, the statute applies only to public officials who have private interests in public "contracts," specifically to a public officer or public employee who "[i]n the officer's or employee's private capacity, negotiates or bids for or enters into a contract." Wis. Stat. § 946.13(1)(a). The statute does not apply to a municipality's exercise of its zoning powers, such as granting or denying zoning variances or conditional use permits, because zoning decisions are not "contracts" within the meaning of Wis. Stat. § 946.13(1)(a).

¶ 3. As the Wisconsin Supreme Court requires, I begin with the plain language of the statute and the inquiry stops "[i]f the meaning of the statute is plain." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary,

and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.*

¶ 4. Wisconsin Stat. § 946.13(1)(a) makes it a Class I felony if:

Any public officer or public employee

(a) In the officer’s or employee’s private capacity, negotiates or bids for or enters into a contract in which the officer or employee has a private pecuniary interest, direct or indirect, if at the same time the officer or employee is authorized or required by law to participate in the officer’s or employee’s capacity as such officer or employee in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer’s or employee’s part

¶ 5. An element “for the offense of holding a private interest in a public contract” under Wis. Stat. § 946.13(1)(a) is that “the defendant negotiated (or bid for or entered into) a contract in a private capacity.” *State v. Venema*, 2002 WI App 202, ¶ 15, 257 Wis. 2d 491, 650 N.W.2d 898. Because the word “contract” is not defined in the statute, it must be given its “common, ordinary, and accepted meaning.” *Kalal*, 271 Wis. 2d 633, ¶ 45. In Wisconsin, a contract is defined as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” *Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App 242, ¶ 11, 267 Wis. 2d 873, 672 N.W.2d 141 (internal quotation omitted). “The elements of a contract are offer, acceptance, and consideration.” *In re F.T.R.*, 2013 WI 66, ¶ 57, 349 Wis. 2d 84, 833 N.W.2d 634.

¶ 6. Under Wisconsin law, a municipality’s zoning decision is not a contract. The zoning municipality does not make an agreement with the zoned property owner in exchange for consideration, which is enforceable by either side in a breach of contract lawsuit. Instead, zoning is a police power to be exercised for the health, safety, morals, and general welfare of the community. *See* Wis. Stat. §§ 59.69(1) (counties), 60.61(1)(a)-(b) (towns), 61.35 (villages), and 62.23(7)(am) (cities). Under this power, a municipality “may regulate and restrict buildings in height and size, the percentage of the lot which they may occupy, the size of yards, open spaces, density of population and the location and use of buildings and land for trade, industry, residences or other purposes.” *Step Now Citizens Grp. v. Town of Utica Planning & Zoning Comm.*, 2003 WI App 109, ¶ 25, 264 Wis. 2d 662, 663 N.W.2d 833. Municipalities do not enforce zoning violations through breach of contract lawsuits. Instead, they enact zoning ordinances that provide for forfeitures,

finer, or civil penalties for violations. *See, e.g.*, Wis. Stat. §§ 56.69(11), 60.61(6), 61.35, and 62.23(7)(f). In fact, it is illegal under Wisconsin law for municipalities to make zoning decisions by contract with a property owner. *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 28, 174 N.W.2d 533 (1970) (“A contract made by a zoning authority to zone or rezone or not to zone is illegal and the ordinance is void because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers.”). For these reasons, a municipality’s zoning decision is not a “contract” under Wis. Stat. § 946.13(1)(a) and therefore the statute does not apply to an official’s participation in a zoning decision.

¶ 7. This opinion does not address whether the alderman can vote on the potential “modification of a previously existing development agreement with regard to the subdivision” mentioned in the statement of facts attached to your request. Because the statement of facts does not state the relevant facts of this development agreement, such as the parties to the agreement or its terms, I cannot offer an opinion on whether a negotiation to modify or modification of the development agreement would implicate Wis. Stat. § 946.13(1)(a). Given that Wis. Stat. § 946.13(1)(a) requires the negotiation, bidding or entering into a contract, however, there could be no violation relating to this development agreement if there are no modifications to, or negotiations or bidding relating to, the development agreement.

¶ 8. This opinion interprets only Wis. Stat. § 946.13(1)(a). It does not analyze whether the alderman would need to recuse himself, or take any other actions, in order to comply with other laws when the City of Oconomowoc considers zoning issues relating to the properties in which he has an ownership interest.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBV:BPK:mlk